No. 98-2058

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titantic Ventures,
limited partnership,
Petitioner,

v.

CHRISTOPHER S. HAVER;
DEEP OCEAN EXPEDITIONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHRISTOPHER S. HAVER AND DEEP OCEAN EXPEDITIONS

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QUESTION PRESENTED

Whether a federal district court sitting in admiralty may, in an unopposed *in rem* salvage proceeding, issue an *ex parte* order that would, without benefit of pleadings, process, or trial, prohibit every person in the world from visiting a specified area of the high seas or photographing a wrecked vessel that otherwise is open to public view in that area.

PARTIES TO THE PROCEEDING

All parties are listed in the petition, but the roles of most of them are misstated.

The action addressed in the petition is strictly *in rem*. Petitioner R.M.S. Titanic, Inc. (RMST) is the only plaintiff, and the wreck of the *Titanic* is the only defendant. There are no other parties. In particular, there are no *in personam* defendants.

Neither respondent Christopher S. Haver nor respondent Deep Ocean Expeditions (DOE) was a defendant in the district court *in rem* proceedings. Rather, they, along with Wildwings Worldwide Travel, Bakers World Travel, Quark Expeditions, Inc., Mike McDowell, Ralph White, Don Walsh, Alfred S. McLaren, and the *R/V Akademik Mstislav Keldysh*, were merely named as enjoined entities and persons in the "preliminary injunction" from which respondents Haver and DOE appealed to the United States Court of Appeals for the Fourth Circuit. None of them was a party to the *in rem* action in which petitioner RMST filed its motion for a preliminary injunction. Respondent Haver was a counterdefendant in the district court in that petitioner RMST filed a counterclaim in Haver's declaratory judgment action against RMST, which the district court then consolidated "into" the *in rem* action. The district court took no further action on either Haver's complaint or RMST's counterclaim. In recognition of their nonparty status, the court of appeals denominated Haver and DOE "parties in interest-appellants" and denominated the remaining enjoined persons and entities "parties in interest."

Rule 29.6 Disclosure. Respondent Deep Ocean Expeditions is a privately held company incorporated in the British Virgin Islands; it has neither a parent company nor a subsidiary.

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STATEMENT OF THE CASE

In late 1997 and early 1998, respondent Deep Ocean Expeditions planned, prepared, and marketed Operation Titanic, an expedition to visit, observe, and photograph the wreck of the infamous British ocean liner *RMS Titanic* as she lay on the bottom of the Atlantic Ocean some 325 miles off the coast of Canada. Respondent Christopher S. Haver subscribed to participate in DOE's expedition. Both DOE and Haver realized that petitioner R.M.S. Titanic, Inc. had been declared salvor in possession of the wreck in an *in rem* action in the United States District

Court for the Eastern District of Virginia. Accordingly, they disavowed any intent to conduct salvage operations or interfere with those of RMST. Their activities would be limited to observing and photographing the wreck.

Because they had no claim to the wreck of the *Titanic* or its contents, respondents saw no need to examine the record of RMST's *in rem* salvage action against the wreck and its contents in which, as usual in such cases, only those with such claims had been notified to come forth. Consequently, DOE and Haver were surprised to learn, just a few months before Operation Titanic was to begin, that RMST claimed that the district court had, in its salvage action, granted RMST the right to control access to the wreck and more than 300 square miles of ocean surrounding the wreck.

District Court Proceedings. Soon after respondents discovered RMST's territorial claim, on May 4, 1998, respondent Haver filed a complaint against RMST asking the court that had granted RMST salvage rights to declare that Haver's visiting, observing, and photographing the wreck would not violate RMST's rights. On the same day, RMST moved in its *in rem* action for a "preliminary injunction" against DOE and other nonparties to prevent them from visiting or photographing the wreck. RMST did not file a complaint against DOE and the others; nor did it serve them with process of any kind. RMST later filed an answer and counterclaim in Haver's action and amended its motion for preliminary injunction in the *in rem* action to add Haver as a person to be enjoined. Although RMST, in its counterclaim, sought a permanent injunction against Haver, it did not seek preliminary relief in that action. The district court then *sua sponte* consolidated Haver's action "with and into" RMST's *in rem* action, ordering that Haver's action would "no longer exist as a separate case."

The district court proceeded to hear and determine RMST's motion for a preliminary injunction against DOE, Haver, and others in the *in rem* action, even though Haver was the only person who made an appearance. The court reaffirmed its previous decision that it could exercise *in rem* jurisdiction over the wreck as it lay on the bottom of the Atlantic far beyond the court's territorial limits. It concluded that RMST had properly invoked that *in rem* jurisdiction by bringing a wine decanter from the wreck into court and that RMST therefore had a maritime lien not only on the salvaged decanter but also on the entire unsalvaged wreck and its contents. App. 63. Further the court concluded that RMST had properly executed on its lien by having the decanter and the wreck arrested, even though the marshal's return on the arrest warrant disclosed that it had been "served" by delivering it to RMST's attorney in Norfolk, Virginia. App. 63-64.

The district court determined that it could issue the requested injunction against entities and persons over whom it lacked personal jurisdiction because orders issued in an *in rem* action are effective against the entire world without regard to personal jurisdiction. App. 64. Furthermore, the entire world had been placed on notice by publication when RMST's salvage action had been initiated in 1994, App. 64-65, even though that notice had been addressed only to "any person claiming an interest in the *in rem* defendant," which was described as "the salvage of [the wreck of the *Titanic*]." As for Haver, the court concluded that he had become a party to the *in rem* action when the court had consolidated his declaratory judgment action with and into the *in rem* action. App. 67. In addition, the court found that all entities and persons to be enjoined had received actual notice of RMST's motion for a preliminary injunction, and that

this accorded with Rule 65(a)(1) of the Federal Rules of Civil Procedure, which merely requires "bare notice to the adverse party" before an injunction may be issued. *Id.*

The district court rejected Haver's attempts to demonstrate that his proposed activities would not harm RMST's interests. Citing previous orders (App. 82-86 and App. 87-108) in which the court had granted RMST exclusive rights to visit and photograph the wreck as "law of the case," App. 71, the court issued the requested "preliminary injunction" prohibiting DOE and Haver, among others, from entering the wreck site or photographing the wreck at any time, regardless of whether such activities would interfere with RMST's salvage operations. App. 79-80. The court did not explain what its injunction was preliminary to, there being no further proceedings pending nor any complaint on which further proceedings could be based.

Court of Appeals' Decision. The United States Court of Appeals for the Fourth Circuit reversed, concluding that the district court could not enjoin DOE and Haver from engaging in the only activity they proposed to do: visiting and photographing the wreck of the *Titanic*.

The district court had no authority to enjoin DOE at all, the court of appeals concluded, because neither RMST nor the district court had even made an attempt to obtain personal jurisdiction over DOE. App. 19-20.

The court of appeals held that Haver was subject to personal jurisdiction in the district court, because he had filed an action there on the same subject matter. The court of appeals' further conclusion that the district court's preliminary injunction was properly directed toward Haver was, however, based on its mistaken finding, App. 21, that RMST had sought a preliminary injunction against

Haver in both RMST's counterclaim in Haver's *in personam* action and in RMST's *in rem* action (in which Haver was not a party). The record shows that RMST's motion for a preliminary injunction was filed only in the *in rem* action. It never asked for preliminary relief with respect to its counterclaim in Haver's declaratory judgment action. This error proved inconsequential, however, because the court of appeals ultimately held, App. 40-43, that the district court had no authority to grant RMST either exclusive photography rights or the right to exclude others from a specified portion of the high seas.

REASONS FOR DENYING THE WRIT

Petitioner presents a bold proposition: that a federal district court sitting in admiralty may, in an unopposed *in rem* proceeding, issue an *ex parte* order that would prohibit every person in the world from visiting a specified area on the high seas or photographing an object that otherwise is open to public view in that area. Petitioner asserts that this can be done in a salvage proceeding, in which the plaintiff's only legitimate interest is to seek an award for rescuing property from peril at sea.

The two questions presented by petitioner, like the wreck of the *Titanic*, lie buried beneath a sea of confusion. They cannot be reached without passing through a tempest of procedural and substantive issues, which, though likely dispositive in this case, are of little moment in American jurisprudence. And the destination is not worth the trip: petitioner's ultimate questions involve arcane treasure salvage issues that are hardly among the most important issues facing the federal judiciary.

I. PETITIONER'S SECOND QUESTION IS AN INVITATION FOR THIS COURT TO LEGISLATE.

By its second question, petitioner asks the Court to create a new right for salvors: an absolute right to ex-

clude all others from visiting or photographing a wrecked vessel at any time. Moreover, petitioner suggests that this right may be granted as preliminary relief in an *in rem* proceeding in which prospective vistitors and photographers are not parties and of which they have not even received notice.

Contrary to petitioner's suggestion (Pet. 17-19), this would not be the type of incremental change that has characterized the evolution of the law of salvage. Rather it would, as the court of appeals stated, App. 41-43, be a traumatic change that would distort the salvor's traditional role. Petitioner tips its hand by citing (Pet. 17-19) a number of public policy considerations that it believes support the granting of such a right in cases like this. Respondent could similarly cite a number of public policy reasons for denying such a right. Such appeals, however, should be directed to the legislature. The judiciary is simply unequipped and unauthorized to consider and resolve such public policy debates. Salvors who seek rights beyond those afforded by their traditional maritime lien in salved property must be told to address their petition to the Congress or to those who are engaged in developing treaties on the subject.

Nothing in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959), or any other decision of the Court authorizes the federal judiciary to create salvage rights unknown in any other area of the law, especially when the result would, as the court of appeals concluded (App. 41-43), be contrary to fundamental principles of salvage law, copyright law, and the law of the sea. *Cf. Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) (judge-made maritime law must comport with relevant statutes).

II. THE INJUNCTION PETITIONER SEEKS IS NOT AKIN TO THOSE COUNTENANCED IN THE DICTA PETITIONER CITES.

In denying the district court's ability to issue an injunction against nonparties, the court of appeals did not slight any principles endorsed by this Court. The circumstances here are unlike those involved in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) and other cases cited by petitioner.

In *Washington State Commercial Passenger Fishing Vessel Ass'n*, nonparty fishermen questioned the power of the district court to subject them to injunctions by which the district court administered a fishery that the state of Washington was unable or unwilling to administer in accordance with applicable Indian treaties. These nonparties were subject to the injunctions because "they, in their common public rights as citizens of the State [of Washington], were represented by the State in those proceedings, and, like it, were bound by the judgment." 443 U.S. at 692 n.32 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)). In dicta, the Court stated that the fishermen were also "probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, *e.g.*, *United States v. Hall*, 472 F.2d 261 (CA5 1972), . . . or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641 [(1977)]." 443 U.S. at 692 n.32 (parallel citations omitted).

The court of appeals' decision at issue here conflicts with neither the holding nor the dicta in *Washington State Commercial Passenger Fishing Vessel Ass'n*. There the

injunction was issued to enforce a judgment after trial. Here petitioner sought a preliminary injunction to foreclose the liberty interest of nonparties without benefit of a complaint, a judgment, or a trial. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, —— U.S. ——, 119 S. Ct. 1961 (1999) (prior to the entry of a money judgment, the district court lacks authority to issue a preliminary injunction preventing the defendant from transferring assets in which the plaintiff claims no lien or equitable interest). There, the nonparties' interest had been fully represented by a defendant in the proceedings; here, petitioner proposes an injunction that could be issued *ex parte* in an unopposed proceeding. Moreover, this case does not involve public rights like those at issue in cases addressing Native American fishing rights and school desegregation. Finally, the preliminary injunction sought by petitioner does not target activity that would interfere with the district court's possession or control of the *res*. Nor does it otherwise affect a property interest in the *res*.

RMST's reliance on *Zych v. SB Lady Elgin*, 1991 U.S. Dist. LEXIS 2962 (N.D. Ill. March 11, 1991), *vacated on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992), is puzzling at best. The case is an unpublished opinion on an unopposed motion for a preliminary injunction in which the district court committed an error similar to that committed by the district court in this case, except the court there did not create new rights for the salvor. The case has no precedential value.

III. THE ALL WRITS ACT IS INAPPLICABLE.

As the Fourth Circuit held, "It is well established that due process precludes courts from adjudicating *in personam* the rights or obligations of persons in the absence

of personal jurisdiction." App. 17 (citing *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)). It simply makes no sense to contend, as petitioner does, that the All Writs Act trumps the Due Process Clause of the Fifth Amendment and empowers a district court to deprive a nonparty of a substantial liberty interest without benefit of a complaint, a summons, service of process, or a trial. Again, the injunction petitioner seeks has nothing to do with property interest in the *res* before the district court. Petitioner is mistaken when it asserts (Pet. 16) that the Act has been applied to similar situations. Nothing in the cases cited by petitioner supports its position.

In fact, in every case cited by petitioner (Pet. 15-16) in which a court issued an injunction against a nonparty, the injunction was directed toward a plaintiff who had initiated litigation in another court that threatened to frustrate the enjoining court's jurisdiction in an action then pending before that court. Importantly, the injunctions issued in those cases did not purport to adjudicate the rights of the enjoined persons on the merits of the matter. And even in such cases, "the persons enjoined [must] have the 'minimum contacts' that are constitutionally required under due process." *United States v. International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). Of course, neither Haver nor DOE have any contacts with Virginia.

Petitioner's suggestion that the All Writs Act may be used to circumvent the Due Process Clause does not warrant review in this Court.

IV. THE QUESTIONS PRESENTED BY PETITIONER CANNOT BE REACHED WITHOUT FIRST ADDRESSING NUMEROUS PROCEDURAL AND SUBSTANTIVE ERRORS.

The questions specified in the petition would not reach the Court in the pristine condition portrayed by the petitioner. In particular, the following procedural and substantive defects would have to be examined before reaching the questions presented by petitioner:

1. The lower courts' conclusion that a salvor has a maritime lien (which is a prerequisite to an *in rem* action) in property that is part of the wreck being salved, but that has not yet been recovered.

2. The lower courts' conclusion that an *in rem* plaintiff may satisfy the requirement, in Supplemental Rule C of the Federal Rules of Civil Procedure, that the *res* be found within the territorial limits of the district by bringing into court a single object from the wreck (here, a wine decanter), while the wreck itself and the remainder of its contents lie well beyond the court's territorial limits at the bottom of the Atlantic Ocean 325 miles off the coast of Canada.

3. The lower courts' conclusion that, contrary to the mandate of Supplemental Rule C of the Federal Rules of Civil Procedure, a court may exercise *in rem* jurisdiction over a *res* that is not, and never will be, within the district.

4. The lower courts' conclusion that an arrest warrant may properly be served by delivering it to the *in rem* plaintiff's attorney, without the marshal's either taking possession of the *res* or affixing a copy of the warrant to the *res*, as required by Supplemental Rule E(4)(b).

5. The district court's conclusion that persons who desired only to visit and photograph the wreck of the

Titanic as it lay on the bottom of the Atlantic some 325 miles off the coast of Canada, had been placed on notice that their interests were at stake in an *in rem* proceeding when the public notice of such proceedings was addressed only to "any person claiming an interest in the *in rem* defendant," which was described as "the salvage of [the wreck of the *Titanic*]."

6. The lower courts' conclusion that a district court may entertain a motion for a preliminary injunction against specified persons and entities who are not parties to the action in which the motion is filed.

7. The district court's refusal to tailor its injunction so as to impose the minimum restriction necessary to prevent interference with the plaintiff's salvage operations.

Even if the ultimate questions submitted by the petitioner were worthy of review, which they are not, the Court could not reach them without first disposing of this list of pedestrian issues.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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